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No. 08-448

In the Supreme Court of the United States

CABLE NEWS NETWORK, INC., ET AL., PETITIONERS

v.

CSC HOLDINGS, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

A copyright holder has the exclusive rights "to reproduce the copyrighted work in copies" and, in the case of audiovisual works and other specified classes of works, "to perform the copyrighted work publicly." 17 U.S.C. 106(1) and 106(4). Respondents intend to offer a remote-storage digital video recorder (RS-DVR) service that would allow subscribers to record television programs when they air and watch the programs at a later time. The questions presented are as follows:

1. Whether respondents would directly infringe petitioners' reproduction rights when the RS-DVR system makes copies of programs and stores those copies on computer hard drives located at facilities owned by respondents.

2. Whether respondents would directly infringe petitioners' reproduction rights when the RS-DVR system, as part of its normal operations, temporarily stores in data buffers small portions of all programs that respondents broadcast.

3. Whether respondents would directly infringe petitioners' public-performance rights when the RS-DVR system transmits previously recorded programs to a subscriber at the subscriber's request.

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This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. Respondents operate cable television systems. Petitioners own the copyrights to numerous programs, which they provide to respondents for broadcast pursuant to various licensing arrangements. Pet. App. 2a.

In March 2006, respondents announced plans to offer a service called a remote-storage digital video recorder (RS-DVR). In May 2006, petitioners filed suit against respondents in federal district court, alleging that the proposed RS-DVR service would infringe petitioners' copyrights. Less than a month later, the parties stipulated that petitioners would assert only claims of direct

(rather than secondary) liability, and that respondents would not assert any fair-use defense. Pet. App. 3a, 44a, 60a-61a.

2. The district court granted summary judgment to petitioners, concluding that respondents would violate petitioners' copyrights at three points during the operation of the RS-DVR system. Pet. App. 43a-80a.

a. The district court held that the creation and storage of recorded programs on computer hard drives located at facilities owned by respondents would violate petitioners' exclusive right "to reproduce the copyrighted work in copies or phonorecords." 17 U.S.C. 106(1). The parties "agree[d]" that the critical question was "*who*" should be deemed to "make" those copies. Pet. App. 64a. The district court concluded that respondents would be "doing the copying" because the RS-DVR would be a "service" rather than a "stand-alone" piece of equipment. *Id.* at 66a-68a. The court emphasized that respondents would have "ongoing participation * * * in the recording process," *id.* at 67a, and "unfettered discretion in selecting the programming that [they] would make available for recording through the RS-DVR," *id.* at 71a.

b. Petitioners' second claim involves data buffering. Cable systems aggregate feeds from various content providers and send the aggregated data stream to subscribers. To operate the RS-DVR, respondents would split the aggregated data stream into two identical streams and send one stream to the RS-DVR system, which would perform a series of digital operations. At several points, the RS-DVR system would temporarily hold snippets of programming data in a series of data buffers. No data would be held in any buffer for longer than 1.2 seconds, and existing data would be erased and

overwritten when new data entered the buffer. Pet. App. 5a, 54a.

The district court concluded that the key question was whether the buffered data would be "fixed." Pet. App. 72a-74a. The Copyright Act defines "copies" as "material objects * * * in which a work is fixed," and it states that "[a] work is 'fixed' * * * when its embodiment in a copy or phonorecord * * * is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." 17 U.S.C. 101. The district court concluded that the buffered data would satisfy that definition because those data would be used to "make permanent copies of entire programs" and therefore would be "capable of being reproduced." Pet. App. 73a.

c. The district court also held that the transmission of previously recorded programs from respondents' hard drives to a subscriber's television would constitute an unauthorized public performance of petitioners' copyrighted works. Pet. App. 75a-80a. The Copyright Act states that "[t]o perform or display a work 'publicly'" includes "transmit[ting] or otherwise communicat[ing] a performance or display of the work * * * to the public * * * whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times." 17 U.S.C. 101(2). In the district court's view, respondents "would transmit the same program to members of the public, who [would] receive the performance at different times, depending on whether they view the program in real time or at a later time as an RS-DVR playback." Pet. App. 77a.

3. The court of appeals reversed. Pet. App. 1a-42a.

a. The court of appeals held that respondents would not directly infringe petitioners' reproduction rights when the RS-DVR system copies and stores programs at a customer's request. Pet. App. 18a-27a. The court acknowledged that respondents have "design[ed], hous[ed], and maintain[ed] a system that [would] exist[] only to produce a copy," *id.* at 20a, but concluded "that an RS-DVR customer [would not be] sufficiently distinguishable from a VCR user to impose liability as a direct infringer on a different party for copies that [would be] made automatically upon that customer's command," *id.* at 21a. The court recognized that respondents would "ha[ve] significant control over the content recorded by [its] customers" on the RS-DVR system, but it observed that such control would be "limited to [determining] the channels of programming available to a customer and not to the [selection of particular] programs." *Id.* at 23a; see *ibid.* (distinguishing video-on-demand service, where respondents "actively select[] and make[] available beforehand the individual programs available for viewing"). The court of appeals concluded that it "need not decide today whether one's contribution to the creation of an infringing copy may be so great that it warrants holding that party directly liable for the infringement, even though another party has actually made the copy." *Id.* at 26a.

b. The court of appeals held that "the acts of buffering in the operation of the RS-DVR [would] not create copies, as the Copyright Act defines that term."

Pet. App. 18a.[1] The court concluded that the statutory definition of "fixed" "imposes two distinct but related requirements." *Id.* at 11a. The first, which the court of appeals referred to as the "embodiment requirement," is that "the work must be * * * placed in a medium such that it can be perceived, reproduced, etc., from that medium." *Ibid.* The second, which the court referred to as the "duration requirement," is that the work "must remain thus embodied 'for a period of more than transitory duration.'" *Ibid.* (quoting 17 U.S.C. 101).

The court of appeals determined that the buffer data created by the RS-DVR system would satisfy the embodiment requirement but not the duration requirement. Pet. App. 16a-18a. The court noted that, in the RS-DVR system, "[n]o bit of data [would] remain[] in any buffer for more than a fleeting 1.2 seconds," and that "each bit of data [would be] rapidly and automatically overwritten as soon as it [was] processed." *Id.* at 17a. The court stated that the inquiry was "necessarily fact-specific," and that "other factors not present here may alter the duration analysis significantly." *Ibid.*

c. The court of appeals held that the transmission of a previously recorded program to a subscriber at the subscriber's request would not infringe petitioners' public-performance rights. Pet. App. 27a-42a.[2] The court construed the Copyright Act to require an "examin[ation of] who precisely is 'capable of receiving' a particular transmission of a performance." *Id.* at 30a. It agreed with respondents that "because each RS-DVR

[1] Given that holding, the court of appeals concluded that it was "unnecessary * * * to determine whether any copies produced by buffering data would be de minimis." Pet. App. 18a.

[2] The court assumed for purposes of its decision that respondents would "make[]" the relevant transmissions. Pet. App. 28a.

transmission is made using a single unique copy of a work, made by an individual subscriber, one that can be decoded exclusively by that subscriber's cable box, only one subscriber is capable of receiving any given RS-DVR transmission." *Id.* at 30a-31a; accord *id.* at 36a, 39a, 41a.

DISCUSSION

Network-based technologies for copying and replaying television programming raise potentially significant questions, but this case does not provide a suitable occasion for this Court to address them. The Second Circuit is the first appellate court to consider the copyright implications of network-based analogues to VCRs and set-top DVRs, and its decision does not conflict with any decision of this Court or another court of appeals. The parties' stipulations, moreover, have removed two critical issues—contributory infringement and fair use—from this case. That artificial truncation of the possible grounds for decision would make this case an unsuitable vehicle for clarifying the proper application of copyright principles to technologies like the one at issue here.

From the consumer's perspective, respondents' RS-DVR service would offer essentially the same functionality as a VCR or a set-top DVR. And although scattered language in the Second Circuit's decision could be read to endorse overly broad, and incorrect, propositions about the Copyright Act, the court of appeals was careful to tie its actual holdings to the facts of this case. The petition for a writ of certiorari therefore should be denied.

A. This Case Does Not Satisfy The Court's Traditional Criteria For Granting A Writ Of Certiorari

1. The Second Circuit's decision does not conflict with any decision of this Court or another court of appeals

a. The Second Circuit is the first appellate court to address the copyright implications of the shift from a set-top-based to a network-based system of enabling consumers to record and play back television programs of their own choosing. The decisions on which petitioners rely addressed different technologies and arose in different factual contexts. As a result, there is no conflict between the outcome of this case and any previous decision.

The Second Circuit's decision, however, is unlikely to be the last appellate ruling to address these issues. Other cable providers may initiate services that are similar to respondents' RS-DVR. Analogous issues also may arise with respect to other network-based services for copying and playing back copyrighted works.[3] Deferring review of the legal issues raised by various network-based playback technologies would allow those issues to be more fully explored by litigants and the lower courts. This Court would then be in a better position to address the legal significance, if any, of the differences between various technologies and services.

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[3] One example may be music lockering services, which permit users to upload files to a remote computer server and stream that music to a personal device over the Internet. The general development of cloud computing, which is an umbrella term for services where programs or files are stored remotely and accessed via the Internet or other means, may generate similar issues.

b. None of the Second Circuit's specific holdings in this case conflicts with any holding of this Court or another court of appeals.

i. The Second Circuit held that, "on the facts of this case, copies produced by the RS-DVR system [would be] 'made' by the RS-DVR customer, and [respondents'] contribution to this reproduction * * * [would] not warrant the imposition of direct liability." Pet. App. 26a-27a. Petitioners acknowledge that the court of appeals' analysis of this issue is consistent with *Religious Technology Center* v. *Netcom On-Line Communication Services, Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995), and *CoStar Group, Inc.* v. *Loopnet, Inc.*, 373 F.3d 544 (4th Cir. 2004), and they do not assert that it conflicts with any published decision of another court of appeals.[4]

Contrary to petitioners' contention (Pet. 15, 21-22, 25, 28), the Second Circuit's decision in this case does not conflict with *New York Times Co.* v. *Tasini*, 533 U.S. 483 (2001). As framed by the parties, the critical issue here is "*who*" would "make" the copies that would be stored on the RS-DVR system. Pet. App. 64a; accord *id.* at 19a. No similar question was presented in *Tasini*.

The Court in *Tasini* construed 17 U.S.C. 201(c), which authorizes publishers of collective works, in certain specified circumstances, to reproduce and distribute articles written by freelance authors. The Court held

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[4] Petitioners' reliance (Pet. 28-29) on the Fifth Circuit's unpublished decision in *Playboy Enterprises, Inc.* v. *Webbworld*, No. 98-10097, 1999 WL 25053 (Jan. 8, 1999) (per curiam), is misplaced. Even a genuine conflict between a published decision and an unpublished decision would not warrant this Court's review. In any event, because the Fifth Circuit's decision in *Webbworld* states, in its entirety, "[w]e affirm essentially for the reasons stated by the trial judge," *id.* at *1, it is impossible to identify the precise basis for the Fifth Circuit's decision.

that Section 201(c) did not apply to the creation of copies of individual articles for inclusion in certain databases and the distribution of those copies to database users. *Tasini*, 533 U.S. at 488. As petitioners point out (Pet. 21-22), this Court rejected the argument that, under *Sony Corp.* v. *Universal City Studios, Inc.*, 464 U.S. 417 (1984), the publishers "could be liable only under a theory of contributory infringement." *Tasini*, 533 U.S. at 504. But the premise of the Court's analysis was that the publishers had made copies of the articles that they were selling. See *id.* at 491 (stating that copies were made "when, as permitted and facilitated by the Print Publishers, [the Electronic Publishers] placed the Articles in [certain] databases"); *id.* at 504 ("it is the copies themselves, without any manipulation by users, that fall outside the scope of the § 201(c) privilege"). By contrast, in this case, "who makes the copies?" is the fundamental question.

ii. The Second Circuit's rejection of petitioners' buffering claim does not conflict with *MAI Systems Corp.* v. *Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993). The court of appeals distinguished, rather than disagreed with, the decision in *MAI Systems*. As it explained (Pet. App. 12a-13a), *MAI Systems* involved the loading of software into a computer's random access memory so that the defendant's employee could service the computer. Recognizing that the courts in *MAI Systems* and its progeny had not analyzed the statute's "transitory duration" language or considered whether that language imposes a separate "duration requirement" (in addition to an "embodiment requirement") the Second Circuit reasonably declined to read those decisions as holding

sub silentio that no such requirement exists. *Id.* at 12a.[5] The Second Circuit's conclusion that the duration requirement that it found in the statute probably would have been satisfied in *MAI Systems*, see *id.* at 13a, 17a, further underscores the lack of any conflict. Finally, the Second Circuit noted that "unlike the data in cases like *MAI Systems*, which remained embodied in the computer's RAM memory until the user turned the computer off," the buffered data in respondents' RS-DVR system would be "rapidly and automatically overwritten as soon as it [was] processed." *Id.* at 17a.

iii. Petitioners are also wrong in asserting (Pet. 34-36) that the Second Circuit's public-performance holding conflicts with decisions addressing situations in which an alleged infringer acquired individual copies of a work and made the same copies available to members of the public. See *Columbia Pictures Indus., Inc.* v. *Professional Real Estate Investors, Inc.*, 866 F.2d 278, 279 (9th Cir. 1989); *Columbia Pictures Indus., Inc.* v. *Redd Horne, Inc.*, 749 F.2d 154, 157 (3d Cir. 1984); *Video Pipeline, Inc.* v. *Buena Vista Home Enter., Inc.*, 192 F. Supp. 2d 321, 328 (D.N.J. 2002), aff'd, 342 F.3d 191 (3d Cir. 2003), cert. denied, 540 U.S. 1178 (2004); *On Command Video Corp.* v. *Columbia Pictures Indus.*, 777 F. Supp. 787, 788 (N.D. Cal. 1991). The Second Circuit stated repeatedly that its public-performance holding

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[5] Although it referred to "*MAI Systems* and its progeny," Pet. App. 12a-13a, the Second Circuit did not specifically discuss *Storage Technology Corp.* v. *Custom Hardware Engineering & Consulting, Inc.*, 421 F.3d 1307 (Fed. Cir. 2005), or *Stenograph L.L.C.* v. *Bossard Associates, Inc.*, 144 F.3d 96 (D.C. Cir. 1998). Like *MAI Systems*, however, those decisions involved the loading of software from a computer's hard drive into random access memory and neither specifically addressed the meaning of the "transitory duration" language in 17 U.S.C. 101.

turned on three critical facts, *i.e.*, that "each RS-DVR playback transmission is made [1] to a single subscriber [2] using a single unique copy [3] produced by that subscriber." Pet. App. 41a; accord *id.* at 30a-31a, 36a, 39a. The court of appeals specifically distinguished *Redd Horne* and *On Command* on the ground that those cases involved "successive transmissions to different viewers * * * using a single copy of a given work." *Id.* at 40a.

2. The parties' stipulations would make this case an unsuitable vehicle for examining the issues raised by network-based recording and playback systems

Petitioners argue that the Court should use this case to "set a standard for copyright protection in the marketplace of automated access to and delivery of copyrighted works." Pet. 23. This case, however, presents an unsuitable vehicle for clarifying the applicable legal framework because the parties' agreement not to litigate two critical issues—secondary liability and fair use—distorts the questions that remain and would prevent the Court from seeing whole the fundamental controversy in this case.

a. Less than a month into this litigation, the parties stipulated that petitioners would not pursue any claims based on principles of secondary liability, and that respondents would not raise any fair-use defense. Pet. App. 61a. As a result, neither the district court nor the court of appeals addressed those issues, and this Court would have no opportunity to consider them if it granted review. This case therefore presents no opportunity for the Court to "have the final say" (Pet. 23) even as to the legality of the particular (and currently unique) RS-DVR service that respondents seek to offer.

b. The parties' stipulation also exaggerates the significance of the issues that remain. For example, the Second Circuit's holding that subscribers rather than respondents would "make[] the copies" in the RS-DVR system (Pet. App. 8a; see *id.* at 22a-24a) does not purport fully to establish respondents' liability under the Copyright Act. Instead, it sets only the internal boundary line between direct liability and various kinds of secondary liability. *Id.* at 24a ("Most of the facts found dispositive by the district court * * * seem to us more relevant to the question of contributory liability."). This Court has stated that "the lines between direct infringement, contributory infringement and vicarious liability are not clearly drawn," *Sony*, 464 U.S. at 435 n.17 (citation omitted). The precise location of those lines has assumed dispositive significance here only because petitioners agreed not to pursue secondary-liability claims. Cf. Pet. App. 24a ("to the extent that we may construe the boundaries of direct liability more narrowly, the doctrine of contributory liability stands ready to provide adequate protection to copyrighted works"). In a more usual copyright suit, a court would have the opportunity to review a range of liability claims, each of which potentially would provide some perspective on the others. The parties' stipulation prevents that from happening here.

Respondents' failure to preserve any fair-use defense likewise would hinder this Court's ability to consider the various issues raised by services like the RS-DVR. This Court ruled in *Sony* that the manufacturer and seller of VCRs could not be held liable for copyright infringement because "time-shifting" by consumers constituted a fair use of copyrighted broadcasts. 464 U.S. at 447-456. This Court has never addressed, however, whether

a commercial actor who is charged with direct infringement may defend on the ground that he performed the copying at the behest of a customer who himself would have a fair-use defense.[6] Because of respondents' agreement not to assert a fair-use defense in this case, the question whether respondents or their customers would "make" the non-transient copies in the RS-DVR system has assumed great significance. The importance of that issue would be diminished if not eliminated, however, if commercial actors who make copies to facilitate their customers' time-shifting were held to be entitled to their customers' fair-use defense.

The parties' agreement not to litigate fair-use issues also affects the analysis of petitioners' buffering claim. If the creation and storage of non-transient copies on the RS-DVR system's hard drives were determined not to violate petitioners' exclusive rights under the Copyright Act—either because such copies were deemed to have been made by consumers and would be a fair use similar to the use found to be fair under *Sony*, or because a third party is entitled to a fair-use defense when it makes copies on behalf of a consumer whose own copying would be a fair use—then too the ancillary creation of transient "buffer" copies arguably would be a fair use as well. And if that were the case, the question whether

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[6] Petitioners cite (Pet. 20-21) *Princeton University Press* v. *Michigan Document Services*, 99 F.3d 1381 (6th Cir. 1996) (en banc), cert. denied, 520 U.S. 1156 (1997), as evidence that it is "well-settled" that commercial copiers cannot invoke their customers' fair-use defense. The 6-5 division in that case, however, indicates that the issue is susceptible to legitimate disagreement. Compare *id.* at 1389, with *id.* at 1393-1394 (Martin, C.J., dissenting), *id.* at 1395 (Merritt, J., joined by Daughtry, J., and Moore, J., dissenting), and *id.* at 1401 (Ryan, J., joined by Daughtry, J., dissenting).

the buffered data in the RS-DVR system would be "fixed" would lose most if not all significance.

Finally, respondents' waiver of any fair-use defense affects petitioners' public-performance claim. When a subscriber engages in time shifting, recording the program and playing it back are two sides of the same coin. If fair-use principles would excuse a cable company from liability for unauthorized reproduction when an RS-DVR system copies and stores a program on a hard disk at a subscriber's behest, the same principles might excuse the company from liability for unauthorized public performance when the system transmits the program to the subscriber for playback. Here too, the parties' agreement to litigate the case without reference to fair-use principles has elevated to great importance a question that otherwise might have been insignificant.[7]

B. On The Merits, The Second Circuit Reasonably And Narrowly Resolved The Issues That Were Presented To It

1. For the last 30 years, consumers have been able to record televised programs and to play back the recorded programming at a later time. Respondents' proposed RS-DVR service is part of a broader transition from analog to digital recording and playback, and from business models where consumers purchase a tangible item to those where they pay for a service.

The first commercially available system for consumer-driven recording and playback was the VCR, which was introduced during the 1970s and recorded programs on magnetic tape cassettes. In *Sony*, *supra*,

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[7] The significance of the Second Circuit's public-performance ruling also would be diminished if the subscriber were deemed to be the one "performing" the work—an argument that respondents raised but the court of appeals did not reach. Pet. App. 28a.

copyright holders sued a VCR manufacturer, asserting that its customers were engaged in copyright infringement and that the manufacturer was secondarily liable because it had sold the devices that performed the copying. This Court rejected the claim. The Court held that the manufacturer of a staple article of commerce is not a contributory infringer if its product is "capable of commercially significant noninfringing uses," *Sony*, 464 U.S. at 442, and that VCRs had several commercially significant noninfringing uses, including consumer "time-shifting," *id.* at 447-456. See *Metro-Goldwyn-Mayer Studios Inc.* v. *Grokster, Ltd.*, 545 U.S. 913, 931-935 (2005) (elaborating on *Sony*'s contributory-infringement reasoning).

Since *Sony* was decided, the VCR has gradually given way to digital video recorders (DVRs), which record programming on hard drives in a digital format. The first DVRs were sold directly to consumers, and consumers may still purchase set-top DVRs from companies like TiVo and Phillips. In addition, many cable and satellite companies—including respondents—now lease devices that combine the functionality of a cable box and a set-top DVR, and the vast majority of DVRs are now leased rather than purchased. By 2007, there were approximately 26 million DVRs in the United States, and some experts estimate that 50% of United States households will have DVRs by 2010. *Cable Passes Satellite In DVR*, Wireless Satellite and Broadcasting Newsletter, July 1, 2007, available in 2007 WLNR 16058889.[8]

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[8] Petitioners emphasize (Pet. 20, 25) that, unlike the VCR manufacturer at issue in *Sony*, respondents not only provide the equipment that would be used to make copies through the RS-DVR service, but also select the content that would be available for copying. The same is true, however, when a cable company leases a set-top DVR to its subscriber.

2. In addition to leasing equipment that allows consumers to record television programming as it airs for later viewing, many cable companies—including respondents—also provide programming to subscribers through video-on-demand (VOD) systems. In a VOD system, a cable company stores a selection of programs at its headquarters and makes those programs available to most or all of its subscribers. A subscriber navigates an on-screen menu using a remote control and selects a program, which is transmitted to the subscriber's television over the company's cable network. Unlike with a VCR or set-top DVR, a customer who uses a VOD service need not previously have recorded the program in question, and he may be able to view programs that either never aired at all or would not have been available as part of the subscriber's cable package. Pet. App. 6a, 49a.

The disagreement between the district court and the court of appeals in this case turned in large measure on whether respondents' RS-DVR service is more closely analogous to a set-top DVR or to a VOD service. Compare Pet. App. 21a, 23a, with *id.* at 68a-69a. Respondents prefer the former analogy given that petitioners have never alleged that respondents and similar companies are violating the Copyright Act by leasing set-top DVRs to their subscribers.[9] Petitioners insist on the

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In addition, as the court of appeals pointed out, although respondents determine "the channels of programming available to a customer," they have "no control over what programs are made available on individual channels or when those programs will air." Pet. App. 23a.

[9] An argument could be made that *Sony*'s holding should be limited to cases where a defendant engages in a one-time sale and has no ongoing relationship with its customers or continuing control over the device at issue. Petitioners have litigated this suit, however, on the implicit as-

latter, VOD service analogy for converse reasons: Respondents have negotiated licenses with petitioners for the VOD services that they currently offer, see *id.* at 49a, and respondents do not suggest that they could continue offering VOD services without the licenses.

3. a. The question whether respondents' RS-DVR service would be more analogous to a set-top DVR or to a VOD service is particularly significant with respect to the first question presented. As the parties have framed that issue, the dispositive question is "*who*"—respondents or their subscribers—should be deemed to "make[] the copies" of programs that would be saved on the RS-DVR system's hard drives and available for later playback. Pet. App. 64a; see *id.* at 18a-19a. Petitioners do not dispute that the copies created by a VCR or set-top DVR are "made" by the subscribers, who both select

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sumption that respondents' leasing of set-top DVRs to their subscribers does not violate the copyright laws (cf. note 8, *supra*), and the court of appeals decided the case on that understanding. If the legality of cable operators' leasing of set-top DVRs is thought to be beyond reasonable dispute, the decision whether to analogize the RS-DVR system to those devices or a VOD service takes on particular importance. On the other hand, if the potential Copyright Act challenge to such leasing arrangements is thought to be substantial, petitioners' failure to contest that point would make this case an especially poor vehicle for clarifying the applicable law in this area.

Although DVRs have been sold since 1999, Pet. App. 50a, no federal court has addressed whether the seller or lessor of set-top DVRs may be held liable for copyright infringement. In 2001, copyright holders sued the manufacturer of the RePlayTV DVR. Unlike other DVRs, that device enabled users to skip commercials automatically and send recorded programs to other users. The plaintiffs voluntarily dismissed that suit prior to judgment after the original manufacturer declared bankruptcy and its assets were sold to another company, which discontinued the challenged features. See *Paramount Pictures Corp. v. RePlayTV, Inc.*, 298 F. Supp. 2d 921, 923-924 (C.D. Cal. 2004).

the programs to be recorded and push the buttons that operate those machines. Respondents likewise do not deny that cable providers "make" copies when they provide VOD service.

Accepting the dispute as so framed, the court of appeals reasonably concluded that the subscriber—who would both select the programs to be copied and press the button triggering the actual recording—would "make" the copies that would be stored in the RS-DVR system. Respondents' RS-DVR service would replicate the basic capabilities and limitations of a VCR or a set-top DVR, and it would lack much of the functionality offered by a VOD system. Like a VCR or set-top DVR, the RS-DVR would permit subscribers to view only programs that already have been broadcast and that subscribers could have chosen to view in real time under the terms of their cable packages. Pet. App. 6a, 23a. The RS-DVR also would permit subscribers to view only programs that they personally and previously had directed the system to copy, and it would not allow them to view portions of a program that had aired prior to the subscriber pressing the "record" button. *Id.* at 6a.

To be sure, respondents' RS-DVR service would differ from a set-top DVR in that the tangible devices that would perform the copying and playback would be located in respondents' facilities rather than in a subscriber's home. That shift from local to network-based recording and playback, however, appears largely irrelevant to the determination of who would "make" the copies. With respect to the photocopying of written material, an individual who both selects the pages to be copied and operates the duplicating machine is naturally said to "make" the copies, whether the photocopier is located in the individual's home or at a self-service copy

shop. There is no evident reason for a different result here. See Pet. App. 22a.

Petitioners also overstate the scope of the Second Circuit's holding. The court of appeals announced no "categorical exemption from direct liability" (Pet. 24) for providers of automated services and it did not "assume[]" (Pet. 19 n.4) that only one person can "make" a particular copy. To the contrary, the Second Circuit expressly limited its decision to "the facts of this case" (Pet. App. 26a), and it appears to have assumed that more than one party *can* potentially be held liable as a direct infringer with respect to a single copy. See *id.* at 26a-27a ("copies produced by the RS-DVR customer [would be] 'made' by the RS-DVR customer, *and* [respondents'] contribution to this reproduction by providing the system does not warrant the imposition of direct liability") (emphasis added).[10] The Second Circuit simply resolved a narrow question about a discrete technology in the terms that it had been framed by the parties.

b. The Second Circuit's buffering holding was similarly, and appropriately, limited. The court of appeals observed that, in respondents' RS-DVR system, "[n]o bit of data [would] remain[] in any buffer for more than a fleeting 1.2 seconds." Pet. App. 17a. The court found it "fair to assume that," in *MAI Systems*, "the [relevant] program was embodied in the RAM for at least several minutes." *Id.* at 13a. But the court of appeals did not

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[10] For example, if one person selects the programs or documents to be copied, but hires someone else to push the buttons used to operate the relevant copying machine, it is possible that both could be held liable as direct infringers for any copyright violations that their conduct entails. Under respondents' proposed RS-DVR system, however, subscribers would perform both aspects of the copying.

adopt any categorical rule that an embodiment period of "1.2 seconds" is always too short, or that a period of "several minutes" is always long enough, to render a particular copy "fixed" under 17 U.S.C. 101. To the contrary, the court emphasized that the proper inquiry "is necessarily fact-specific" and that "other factors not present here may alter the duration analysis significantly." Pet. App. 17a. Such caution was particularly appropriate with respect to buffering data because "[a]ll digital devices"—including set-top DVRs—buffer data as part of their normal operations. *Id.* at 54a.

c. The analogy between respondents' RS-DVR service and a set-top DVR is weakest with respect to the public-performance issue because the operation of the former, unlike the latter, would clearly involve a "transmission." See 17 U.S.C. 101 ("To 'transmit' a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent."); Br. in Opp. 26-27. Thus, even if the subscriber would "make" the copies used in the RS-DVR system, respondents might still violate the Copyright Act if they "transmitted" those copies "to the public." Some language in the court of appeals' opinion could be read to suggest that a performance is not made available "to the public" unless more than one person is capable of receiving a *particular* transmission. See, *e.g.*, Pet. App. 36a ("under the transmit clause, we must examine the potential audience of a given transmission by an alleged infringer to determine whether that transmission is 'to the public.'"); *id.* at 41a ("we find that the transmit clause directs us to identify the potential audience of a given transmission"). Such a construction could threaten to undermine copyright protection in circumstances far beyond those presented

here, including with respect to VOD services or situations in which a party streams copyrighted material on an individualized basis over the Internet.

Taken as a whole, however, the court of appeals' analysis of the public-performance issue should not be understood to reach VOD services or other circumstances beyond those presented in this case. The Second Circuit repeatedly explained that its rejection of petitioners' public-performance claim depended on a range of factors: not only that each transmission would be sent to a single recipient, but also that (1) each transmission would be made using a unique copy of the relevant program; and (2) each transmission would be made solely to the person who had previously made that unique copy. See, *e.g.*, Pet. App. 30a-31a, 36a, 39a, 41a. By limiting its holding to circumstances in which those two additional features are present, the Second Circuit sustained the legality of respondents' proposed RS-DVR service without casting doubt on the widespread premise that VOD and similar services involve public performances.

Petitioners also contend (Pet. 37) that, under the court of appeals' decision, respondents could provide VOD services without a license by establishing a system in which the subscriber "will simply send an electronic request first to 'copy' and then to 'play' the desired work." But even assuming that the subscriber in that scenario would be deemed to "make" the copy, the legality of his conduct would be suspect at best, because he would be not simply time-shifting but instead copying programs that he was not otherwise entitled to view. Compare *Sony*, 464 U.S. at 449. And if the subscriber's own copying would violate the Copyright Act, respondents and similar cable providers would be subject to secondary liability for inducing and facilitating that vio-

lation. Cf. *Grokster*, 545 U.S. at 934-937. Indeed, the court of appeals "emphasize[d]" that its decision "does not generally permit content delivery networks to avoid all copyright liability by making copies of each item of content and associating one unique copy with each subscriber to the network, or by giving their subscribers the capacity to make their own individual copies." Pet. App. 41a-42a. Thus, while some aspects of the Second Circuit's reasoning on the public-performance issue are problematic, the court's ultimate holding is less far-reaching than petitioners suggest and is insufficiently important to warrant this Court's review, especially in a case that does not satisfy the Court's traditional criteria for granting a writ of certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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* The Assistant Attorney General is recused in this case.